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ABSTRACT

This chapter covers the nearly 220 cases reported in 1989 involving precollegiate, public-sector employees. Those cases where purely procedural issues are involved are omitted, and procedural issues in the remaining cases are deemphasized. As in previous years, the section on dismissal, nonrenewal, demotion, and discipline has the greatest concentration of cases. Legal issues covered by the review are organized in the following sections: (1) discrimination in employment by race, sex, national origin, age, or handicap; (2) substantive constitutional rights, including speech, association, privacy, and substantive due process; (3) procedural due process, including liberty and property interests, and aspects of notice and hearings; (4) issues of dismissal, nonrenewal, demotion, and discipline (for insubordination, unprofessional conduct, unfitness, willful neglect of duty, immorality or incompetence); (5) reduction in force and involuntary leaves of absence; (6) contract disputes; (7) tenure; and (8) certification, decertification, revocation, and suspension. (MLF)

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EMPLOYEES

Ralph D. Mawdsley

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INTRODUCTION

This chapter covers the nearly 220 cases reported in calendar year 1989 involving pre-collegiate, public-sector employees. The review excludes only those cases analyzed in other sections of the *Yearbook* (e.g., higher education, collective bargaining). Those cases where purely procedural issues are involved are omitted and procedural issues in the remaining cases are deemphasized. The year 1989 saw one Supreme Court case related to school employment; in addition Supreme Court cases from prior years will be mentioned when they are necessary for an understanding of current cases. As in previous years, the section on dismissal, nonrenewal, demotion, and discipline contains the largest concentration of cases, while the section on procedural due process contains the next largest concentration.

DISCRIMINATION IN EMPLOYMENT

Discrimination claims can be based on a number of federal statutes, the most preeminent of which is title VII of the Civil Rights Act of 1964.[1] Title VII prohibits both public and private institutions from discriminating based on race, color, religion, sex, and national origin. Gender-based employment discrimination is prohibited by title IX of the Education Amendments of 1972[2] and gender-based wage discrimination is prohibited by the Equal Pay Act of 1963.[3] Discrimination on the basis of age for persons forty and over is prohibited by the Age Discrimination in Employment Act of 1975 (ADEA)[4] and discrimination against "otherwise qualified handicapped individuals" is prohibited under section 504 of the Rehabilitation Act of 1973.[5] Discrimination based on national origin and race is prohibited by section 1981 of the Civil Rights Act of 1964.[6] Complaints may also be pursued under section 1983 of the Civil Rights Act of 1964 which protects constitutional and statutory rights.[7] However, section 1983 creates no substantive rights but merely provides a remedy for violation of other federally protected rights. Thus alleged title VII violations cannot be asserted under section 1983, but alleged race

1. 42 U.S.C. § 2000 *et seq.*
2. 20 U.S.C. § 1681 *et seq.*
3. 29 U.S.C. § 206 (d) (1).
4. 42 U.S.C. § 1601 *et seq.*
5. 20 U.S.C. § 794 *et seq.*
6. 42 U.S.C. § 1981.
7. 42 U.S.C. § 1983.

discrimination under section 1981 and equal protection can be prosecuted under section 1983.[8] Finally, employment discrimination based on suspect classifications such as race, gender, and national origin can be pursued under the equal protection clause of the fourteenth amendment.

Successful prosecution of an employment discrimination case involves navigating through some potentially difficult statutory and judicial waters. Although normally a discrimination charge must be filed with the appropriate state or local agency within 240 days to ensure that the charge may be filed with the Equal Employment Opportunity Commission (EEOC) within the 300-day limit, claims filed within the 241-300-day time period are considered filed with EEOC where the state and local agency has a work sharing agreement with EEOC.[9] A black teacher and administrator who was able to prove disparate treatment in salary, job classification, promotional consideration, and job duties, as compared to white males similarly situated, was entitled to back pay even though the state Human Rights Commission did not hear his case until thirteen years after it was filed. The court concluded that when a complainant has acted with all diligence in filing a complaint, laches will not bar relief or lessen the amount of the back pay awarded.[10]

Parties in an employment discrimination case must meet judicially-established burden of proof requirements: plaintiff must present evidence she was burdened by an employer policy or practice affecting a category protected by one or more of the anti-discrimination statutes, at which time the burden of producing evidence shifts to the employer to articulate by a preponderance of the evidence a nondiscriminatory reason for the treatment. However, once the employer has articulated a nondiscriminatory reason for the action, the employer is not required to prove that a discriminatory reason played no part in the employment decision concerning plaintiff.[11]

Race

This section saw one Supreme Court decision. In *Jett v. Dallas Independent School District,*[12] sections 1981 and 1983 actions were

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8. McCauley v. Greensboro City Bd. of Educ., 714 F. Supp. 146 (M.D.N.C. 1987).
9. Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472 (9th Cir. 1989).
10. Pittsburgh Bd. of Pub. Educ. v. Human Relations Comm'n, 563 A.2d 581, 582 (Pa. Commw. Ct. 1989).
11. Indiana Civil Rights Comm'n v. Culver Educ. Found., 535 N.E.2d 112 (Ind. 1989).
12. 109 S. Ct. 2702 (1989).

brought by a former white football coach and athletic director reassigned to another school with noncoaching responsibilities by the school superintendent at the recommendation of plaintiff's black high school principal. The Supreme Court determined that the school district could be liable under section 1983 only if the superintendent "possessed final policy making authority in the area of employee transfers," while the school district could not be liable "for its employees' violation of the rights enumerated in section 1981 under a theory of *respondeat superior*."[13]

In four other cases in this section, plaintiffs experienced a measure of victory in two of them. A teacher from 1978-80 who had been a party to a lawsuit in 1985 contending the policies and practices of the school district were racially discriminatory stated a cause of action for retaliation when she applied for a vacant position in April 1985 and was not hired.[14] In another case, a reassignment of white and Hispanic football coaches to the sophomore staff in order to make room for two black coaches was a violation of equal protection and the school district's justification that 80% of the team was black was insufficient. Replacing coaches on the basis of race denied the replaced coaches "their meaningful constitutional right to be free from subjection to suspect racial classifications absent a demonstrable justification compelling enough to survive strict scrutiny."[15]

Complaints based on race were unsuccessful in two other cases. A black nontenured principal who was not awarded tenure after a three year probationary period, and who was succeeded by a white male principal, failed to state a *prima facie* case permitting an inference of discrimination, because the white principal also had to serve a three year probationary period.[16] In the second case, elimination of two positions, one of which was occupied by plaintiff (a black female noncertified vocational assistant), in a funded program in order to save money, and hiring of a white female certified teacher's aide in a completely separate employment category, constituted a nondiscriminatory reason sufficient to rebut plaintiff's race discrimination claim. Plaintiff's claim of her offer to accept less money to keep her job failed to demonstrate that defendant's reason was pretextual because the decision to eliminate the two positions occurred prior to the offer. In addition, the new position had teaching duties which plaintiff's vocational assistance position lacked.[17]

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13. *Id.* at 2724.
14. Sherpell v. Humnoke School Dist. No. 5 of Lonoke County, Ark., 874 F.2d 536 (8th Cir. 1989).
15. Covington v. Beaumont Indep. School Dist., 714 F. Supp. 1402, 1407 (E.D. Tex. 1989).
16. Louis v. Board of Educ. of City of N.Y., 705 F. Supp. 751 (E.D.N.Y. 1989).
17. Smith v. Chicago Bd. of Educ., 530 N.E.2d 1089 (Ill. App. Ct. 1988).

Religion

No cases were reported in this area.

Sex

In all but one case in this section, school districts were successful. In an imaginative claim of gender discrimination a federal district court found no *prima facie* case in a class action lawsuit by elementary principals, most of whom were male, who alleged that their lower pay, when compared to high school principals, occurred because they supervised predominantly female teachers or because there was an historical perspective that elementary schools were traditionally female and their principalships were traditionally female jobs.[18] In another case, a female employee whose position was terminated by the school board at a point in time after she had ceased a consensual sexual relationship with her principal failed to prove sexual discrimination under title VII and section 1983. To prove sexual discrimination, the plaintiff had to produce evidence that employment termination resulted from a failure to provide sexual favors, not merely that the defendant-principal bore a personal grudge and reacted harshly to the failed relationship.[19] In a case involving the potential extent of liability, sexual and/or racial harassment by a superior cannot be imputed to an employer where the employer had addressed earlier complaints and remediated them and had no knowledge of a later anonymous note which evidenced discriminatory intent by the supervisor.[20] In a close case, a school district proffered a nondiscriminatory reason for terminating plaintiff (school superintendent's secretary) where she had prepared and delivered to the school board a salary study on secretary salaries but had not delivered a copy of the study to the superintendent prior to the school board meeting (at which the superintendent was asked to respond), because plaintiff told the superintendent she had not trusted him to deliver a copy of the study to the board. While "disloyalty" by itself cannot be "the sole legitimate nondiscriminatory reason for discharging an employee," unreasonable conduct which results in loss of mutual trust and confidence in the work place will be sufficient.[21]

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18. Siegel v. Board of Educ. of City School Dist. of City of N.Y., 713 F. Supp. 54 (E.D.N.Y. 1989).

19. Keppler v. Hinsdale Township High School Dist., 715 F. Supp. 862 (N.D. Ill. 1989).

20. Fisher v. Tacoma School Dist. No. 10, 769 P.2d 318 (Wash. Ct. App. 1989).

21. Jennings v. Tinley Park Community Consol. School Dist. No. 146, 864 F.2d 1368, 1373 (7th Cir. 1988).

The only successful claimant under this section experienced a less than total victory. A black female teacher with twenty-five years teaching experience and holder of both a master's degree and a secondary principal's certificate was not hired for six or eight administrative positions she had applied for over a five year period. In each case she was the only female applicant and in each case a male applicant was recommended by the male superintendent to an all-male school board. Because of plaintiff's obvious objective qualifications, the court found suspect the superintendent's subjective selection criteria of "leadership," "ability," and "stability." However, no compensatory damages were awarded, but plaintiff was to be granted the next administrative position that became vacant.[22]

National Origin

Only one case was reported in this area. A Mexican-American who filed a title VII and section 1983 national origin discrimination charge when defendant failed to hire her for the 1984-85 school year did not have to file a separate EEOC complaint when she was not hired for the 1985-86 school year since she alleged the 1985-86 decision not to hire her was "in retaliation for her EEOC filing and part of an ongoing pattern of discrimination."[23]

Age

The cases in this section reflect the difficulty in winning under ADEA. In a new hire situation, a federal court of appeals refused to accept the EEOC position that hiring a teacher under age forty, instead of a forty year old plaintiff, as a result of utilizing a salary scale paying a lower salary for lesser years of experience, constituted discrimination under ADEA. The court noted that to accept EEOC's position "would, contrary to the ADEA, effectively require a preference in hiring to those forty and over."[24] A school board did not violate ADEA in hiring a forty-one year old person as Coordinator of Transportation instead of a sixty-one year old plaintiff where state statute required that hiring and promotion be based on seniority, qualifications, and evaluation of past service with the board; in this case, the successful applicant had seventeen years seniority with the board while plaintiff had none.[25] A sixty-two year old Headstart worker who had been suspended as a result of her alleged spanking

22. Willis v. Watson Chapel School Dist., 703 F. Supp. 1381 (E.D. Ark. 1988).
23. Brown v. Hartshorne Pub. School Dist. No. 1, 864 F.2d 680, 682 (10th Cir. 1988).
24. EEOC v. Atlantic Community School Dist., 879 F.2d 434, 437 (8th Cir. 1989).
25. Dalton v. Mercer County Bd. of Educ., 887 F.2d 490 (4th Cir. 1989).

of a child contrary to school rules established a *prima facie* case of age discrimination but was not successful in demonstrating as pretextual the school's nondiscriminatory defense that three other teachers had previously been suspended for spanking children in support of a policy to protect the safety and welfare of students.[26] Two previously furloughed teachers were unable to establish a *prima facie* case under either a disparate treatment or disparate impact theory where a majority of 700 applicants for thirteen teaching positions were under age forty but a majority of those actually hired were over forty. Finally, a plaintiff who had been reassigned from principal of an elementary school to a dual principalship over two elementary schools farther from her home at a time when she was over sixty-five failed to prove "that she suffered a *materially adverse* change in the terms or conditions of employment because of her employer's discriminatory conduct."[28]

Handicap

Cases under this section represented successes for both plaintiffs and defendants. An employee who had retired due to psychiatric disability and was later denied reinstatement eight years later for the same disability was able to present evidence he was physically fit for duty, but he failed to controvert evidence that his continuing psychiatric disability prevented him from performing his activities in a reasonable manner.[29] However, in a state handicap act case, refusal of a school board to hire plaintiff as a school bus driver because the state would not grant a license after the school district's physician found a spinal problem did not immunize the school district from liability under the state act. A triable issue was presented because plaintiff's physician said plaintiff was able to drive a bus and summary judgment was denied the school district because of possible risk of collusion between the school district and its physicians regarding employment decisions.[30]

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26. Mingo County Equal Opportunity Council v. State Human Rights Comm'n, 376 S.E.2d 134 (W. Va. 1988).
27. Lowe v. Commack Union Free School Dist., 886 F.2d 1364 (2d Cir. 1989).
28. Spring v. Sheboygan Area School Dist., 865 F.2d 883, 885 (7th Cir. 1989) (emphasis in original).
29. Bolecek v. State, 542 N.Y.S.2d 268 (App. Div. 1989).
30. Wilks v. Taylor School Dist., 435 N.W.2d 436 (Mich. Ct. App. 1988).

SUBSTANTIVE CONSTITUTIONAL RIGHTS

Cases reviewed in this section concern freedom of speech, association, and religion; the right to privacy; and the right of those with liberty and property interests not to be treated by government in an arbitrary or capricious fashion (i.e., the right to substantive due process under the fourteenth amendment where state government is concerned; or under the fifth amendment where the federal government is concerned). Although the constitutional rights at stake are federal, state sovereign immunity will bar an action as a matter of law, since state law, not federal law controls in such situations.[31]

Speech

Protected free speech is limited to matters of public concern. Courts are split as to what kinds of speech deal with public concern. An applicant rejected for department chairman, who alleged she was retaliated against because she reported sexual harassment of students by a reading teacher to the principal and then to the department of social services when the principal took no disciplinary action, stated a section 1983 cause of action. Allegations that a teacher is taking sexual liberties with students "are of obvious concern to the community." The school district's compelling interest in restoring working relationships and in resuming regular operations was not sufficient to dismiss a complaint alleging a first amendment violation.[32] A school custodian transferred after making a speech to the school board on behalf of a principal charged with sexual harassment was entitled to a jury trial on the issue of free speech because his speech was a matter of public concern.[33] A superintendent's secretary, who was also the school board clerk, was ordered reinstated and a $22,000 judgment against the superintendent was upheld when the secretary was dismissed for objecting to school district patrons and some school board members to some features of a proposed bond issue. The secretary's speech was a matter of public concern and therefore protected by the first amendment. The superintendent's argument on appeal that the secretary's termination was justified because her remarks compromised a confidential employment relationship was rejected because the argument was not asserted at trial.[34] A satirical letter from a P.E. teacher to the school newspaper

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31. Howlett v. Rose, 537 So. 2d 706 (Fla. Dist. Ct. App. 1989).
32. Cromley v. Board of Educ. of Lockport Township High School Dist. 205, 699 F. Supp. 1283, 1288 (N.D. Ill. 1988).
33. Copp v. Unified School Dist. No. 501, 882 F.2d 1547 (10th Cir. 1989).
34. Ware v. Unified School Dist. No. 492, Butler County, Kan., 881 F.2d 906 (10th Cir. 1989).

in response to an article alleging sex discrimination against girls in P.E. classes addressed a matter of public concern and, therefore, denial of his step increment in pay for the following school year violated his free speech rights.[35] A high school librarian who was to be transferred to another city high school after stating in a newspaper article numerous problems concerning teaching in an inner city high school was entitled to an injunction and $15,000 compensatory damages for emotional distress against both the school board and the superintendent because the librarian's comments were matters of public concern and the school board and superintendent failed to prove the librarian would have been transferred anyway if she had not participated in the article.[36] A cafeteria employee's complaints about unsanitary conditions in the school lunchroom and about serving spoiled food to students were matters of public concern and a school board rule prohibiting discussion of lunchroom problems with anyone except the principal violated the employee's free speech. Even though the employee dismissed her lawsuit after the board rule was abolished and before trial, "plaintiff's actions were a significant catalyst or a substantial factor in causing defendants to act" entitling plaintiff to attorneys fees under 42 U.S.C. section 1988.[37]

On the other hand, school employees lost where their statements did not address matters of important policy. A school employee's grievance about her failure to receive a pay increase did not address matters of public concern where the grievance did not concern school policy or the grievance procedure itself.[38] A statement by an employee, ultimately discharged for allegedly lying during an investigation concerning marijuana, that he did not know whether a quantity of marijuana found in his van belonged to a coworker was not a matter of public concern because it did not "constitute a grievance against his employer." The statement was "not made to further the public debate on employment discrimination, drug policy, or any other topic."[39] Finally, a principal's evaluation remark that a teacher was not to involve herself in problems which students had with other teachers and administrators did not burden free speech. The teacher's talking to students about their conversations with faculty members "was either trying to find out what other faculty members

35. Seemuller v. Fairfax County School Bd., 878 F.2d 1578 (4th Cir. 1989).
36. Thompson v. Board of Educ. of the City of Chicago, 711 F. Supp. 394 (N.D. Ill. 1989).
37. Luethje v. Peavine School Dist. of Adair County, 872 F.2d 352, 354 (10th Cir. 1989).
38. Martinez v. Cotulla Indep. School Dist., 700 F. Supp. 17 (S.D. Tex. 1988).
39. Arvinger v. Mayor of Baltimore, 862 F.2d 75, 78, 79 (4th Cir. 1988).

were saying about her or collecting information which she might later need for her lawsuit" and did not involve matters of public concern.[40]

Occasionally, free speech may be claimed by a defendant against whom a school employee has a complaint. In one case a high school wrestling coach lost in his libel suit against a newspaper because an article stating he lied at a hearing was considered to be opinion protected by the first amendment.[41]

Association

The largest number of cases under this section continues to flow from the change of political parties in the 1984 Puerto Rican election. These cases are very much dependent on factual variations, especially as to whether discharged employees can produce evidence that an adverse employment decision was tied to membership in the political party which lost in the 1984 election. In two cases courts found evidence of political association discrimination[42] while two other courts found no such evidence.[43] All of the cases involved nontenured employees who were discharged or their position eliminated but one of the courts stated the constitutional standard in such cases: "[n]o distinction should be made between employees discharged from a permanent position and those who fail to receive a new appointment. [Neither can] be discharged in violation of the [f]irst [a]mendment right to free speech and association."[44]

In two other cases, courts split on violations of association rights. A teacher's constitutional right of association was violated where he was transferred in retaliation for filing a grievance under the collective bargaining contract. The grievance of the teacher "invoked collectively bargained procedures and was a constitutionally protected activity for which retaliation by public officials was prohibited."[45] In the other case, the coordinator of park and recreation programs for the city and its school system was a "political appointee" whose discharge allegedly for political reasons did not violate the first amendment. "Those the people elect are entitled to em-

40. Suber v. Bulloch County Bd. of Educ., 722 F. Supp. 736, 745 (S.D. Ga. 1989).
41. Milkovich v. News-Herald, 545 N.E.2d 1320 (Ohio Ct. App. 1989).
42. Marin-Piazza v. Aponte-Roque, 873 F.2d 432 (1st Cir. 1989); Caro v. Aponte-Roque, 878 F.2d 1 (1st Cir. 1989).
43. Figueroa v. Aponte-Roque, 864 F.2d 947 (1st Cir. 1989); Saquebo v. Roque, 716 F. Supp. 709 (D. Puerto Rico 1989).
44. Saquebo, 716 F. Supp. at 712.
45. Stellmaker v. DePetrillo, 710 F. Supp. 891, 893 (D. Conn. 1989).

ploy others who hold their confidence; they must do so if they are to carry out the programs they promised to pursue."[46]

Privacy

The cases under this section represented diverse problems. A school system's mandatory drug testing by urinalysis of employees, including a bus attendant, involved in transportation of handicapped children had a compelling interest in deterring drug use on the job, outweighing fourth amendment privacy concerns.[47] United States Department of Education random urinalysis testing was permissible under the fourth amendment as to a guard to the Secretary of Education, department of motor vehicle operators, and employees who had access to top-secret information with national security implications, but was impermissible as an unconstitutional violation of privacy as to data processors who did not have access to sensitive information.[48] Regulations promulgated by a state department of education which provided that conviction for any felony or misdemeanor or other stationary traffic violation precludes employment at, or operation or ownership of, a preschool, did not violate right to privacy. The regulations at issue required not only background checks and criminal-record checks, but also fingerprinting of all owners and/or operators and all full or part-time employees.[49] Disclosure of information in personnel files to a newspaper must balance the need for disclosure against the public policy in favor of the confidentiality of private and personal information. In Connecticut, documents evaluating school teachers' performance were exempt from disclosure under state statute.[50]

Substantive Due Process

Violation of substantive due process tends to occur when state actions are arbitrary, capricious, or unfair in substance, rather than lacking in procedural correctness, so as to deprive a school employee of a property or liberty right. A nontenured teacher who was nonrenewed after showing an "R" rated film to high school juniors lost her free expression claim when the court upheld the school principal's

46. Bicanic v. McDermott, 867 F.2d 391, 395 (7th Cir. 1989).
47. Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989).
48. American Fed'n of Gov't Employees, AFL-CIO v. Cavazos, 721 F. Supp. 1361 (D.D.C. 1989).
49. Henry v. Earhart, 553 A.2d 124 (R.I. 1989).
50. Board of Educ. of Town of Somers v. Freedom of Information Comm'n, 556 A.2d 592 (Conn. 1989).

decision that the film was vulgar and sexually explicit and inappropriate for the classroom as determined by "the age and maturity of the students and the contents and quality of the films."[51] A terminated teacher failed to state a cause of action that he was discharged for exercise of first amendment rights when he alleged only that he was present at a committee meeting where the administration was criticized, not that he had criticized the school.[52] A school board could not avoid liability for enforcing an unconstitutional fair share fee procedure pursuant to a collective bargaining agreement on the basis that the board had delegated full authority to the union to determine and collect fair share fees.[53]

PROCEDURAL DUE PROCESS

The Supreme Court decision in *Cleveland Board of Education v. Loudermill,*[54] which set pretermination requirements for procedural due process, continues to be the important guideline in this section. A school bus driver with a one-year definite term contract who was effectively denied access to his bus had a protectable fourteenth amendment property right in his continued employment which was denied him when the school district failed to follow the *Loudermill* requirements. A subsequent meeting with school officials was inadequate where the assistant superintendent did not give the driver, prior to his termination, oral or written notice of specific charges against him, explanation of the school district's evidence, and an opportunity for the driver to present his side.[55]

Violation of procedural due process rights may not necessarily result in substantial damage awards. A black assistant principal who had not been granted *Loudermill* pretermination rights was entitled only to $1 nominal damages because the district court found he "would have been fired even if he had been accorded procedural due process." In addition, the appeals court upheld the 70% reduction in the attorneys fees award.[56]

Finally a teacher who had entered into an agreement with the New York Department of Correctional Services to settle a charge of

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51. Krizek v. Board of Educ. of Cicero-Stickney Township High School Dist. No. 201, Cook County, Ill., 713 F. Supp. 1131, 1139 (N.D. Ill. 1989).
52. Michelin v. Jenkins, 704 F. Supp. 1 (D.D.C. 1989).
53. Lowary v. Lexington Local Bd. of Educ., 704 F. Supp. 1430 (N.D. Ohio 1987).
54. 470 U.S. 532 (1985).
55. Tolson v. Sheridan School Dist., 703 F. Supp. 766 (E.D. Ark. 1988).
56. Rogers v. Kelly, 866 F.2d 997, 1000 (8th Cir. 1989).

excessive absences could be discharged without violating due process when she failed to report five days absence from work. Collective bargaining contract written disciplinary procedures could substitute for those in the state statute.[57]

Liberty and Property Interests

Some cases implicate both property and liberty interests. A school superintendent suffered no deprivation of a protectable property interest when the school board voted tentatively to terminate him, pending his right to a hearing, because the board had provided him an "opportunity to present his side of the story" within the *Loudermill*[58] requirements. The superintendent's liberty interests were likewise not violated by the school board chair's description of him as "hostile and patronizing" or a statement that "we need not accept crumbs" because the comments were not "allegations of moral turpitude."[59] In another case, school board rules required applicants for administrative positions to pass both a written and oral interview. Failure of the oral interview did not permit one applicant to have the opportunity for a second interview, but did not violate his liberty or property interests where no such protectable rights had been created for an oral interview or a review of the first interview.[60]

Liberty claims very often relate to an employee's reputation. A school district employee had no liberty interest violation when a police officer incorrectly categorized the employee's guilty plea of contributing to the delinquency of a minor as "lewd and lascivious conduct" which required registration under state law. In denying a liberty interest violation, the court found no "stigmatizing public disclosure of the inaccurate charge . . . made in connection with termination of employment or the alteration of some right or status recognized by state law."[61]

Property interests must find their basis in some contractual or statutory entitlement. Thus, a probationary high school teacher who resigned during the first year of his contract in order to teach German during the spring term at a college out of state had no property interest in continued employment at his high school position.[62]

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57. Millon v. Coughlin, 537 N.Y.S.2d 645 (App. Div. 1989).
58. *Supra* notes 54 and 55.
59. Adams v. School Dist. No. 5 of Jackson County Or., 699 F. Supp 243, 246, 247 (D. Or. 1988).
60. Thomas v. Board of Examiners, Chicago Pub. Schools, 866 F.2d 225 (7th Cir. 1989).
61. Kirk v. Hesselroth, 707 F. Supp. 1149, 1152 (N.D. Cal. 1989).
62. Hankins v. Dallas Indep. School Dist., 698 F. Supp. 1323 (N.D. Tex. 1988).

Likewise, tenured teachers whose contracts were suspended as a result of reductions in enrollment[63] and a teacher aide terminated from employment[64] lacked property interests entitling them to pre-suspension or pre-termination hearings where applicable state statutes had failed to make such provision. In a similar vein, there were no property interest violations where a teacher received a two-day suspension with pay[65] or where a state statute required that all existing permanent teaching certificates be exchanged for five-year certificates renewable upon completion of continuing education.[66] A school principal whose two-year contract was not renewed did not have a property interest in employment under the Texas Contract Nonrenewal Act beyond the term of the contract.[67] Finally, a teacher had no entitlement under statute, ordinance, contract clause, or collective bargaining provision to be transferred to the position of her choice.[68]

However, some courts were able to find property interests protected by contract or statute. An employee originally hired under a contract terminable at will had a property interest under the school district handbook for classified employees permitting immediate dismissal only for enumerated acts of misconduct or for good cause.[69] A tenured teacher who produced evidence of recovery following a medical leave of absence was entitled under the state education code to reinstatement since the school board failed to produce evidence of incompetency.[70] Rescission of administrator increases at the beginning of the second of a three-year salary increase package was of sufficient magnitude to implicate due process considerations because "the constitutionally revered interest in continued employment must be to some degree intertwined with the economic fruits of that employment."[71]

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63. Downs v. Henry County Bd. of Educ., 769 S.W.2d 49 (Ky. Ct. App. 1988).
64. Harrison County School Bd. v. Morreale, 538 So. 2d 1196 (Miss. 1989).
65. Pitts v. Board of Educ. of U.S.D. 305, Salina Kan., 869 F.2d 555 (10th Cir. 1989).
66. Connecticut Educ. Ass'n, Inc. v. Tirozzi, 554 A.2d 1065 (Conn. 1989).
67. English v. Hairston, 888 F.2d 1069 (5th Cir. 1989).
68. Lewandowski v. Two Rivers Pub. School Dist., 711 F. Supp. 1486 (E.D. Wis. 1989).
69. Dickey v. Adams County School Dist. No. 50, 773 P.2d 585 (Colo. Ct. App. 1988).
70. Raven v. Oakland Unified School Dist., 262 Cal. Rptr. 354 (Ct. App. 1989).
71. Rockford Principals and Supervisors Ass'n v. Board of Educ. of Rockford School Dist. No. 205, 721 F. Supp. 948, 955 (N.D. Ill. 1989).

Aspects of Notice

Notice problems arose at both constitutional and statutory levels. A tenured teacher's request for a hearing in the state's multilevel hearing system was considered timely even though filed with the assistant superintendent instead of the Education Employees Grievance Board. The court in effect found the teacher's due process rights to notice and hearing prior to dismissal were violated when the notice of dismissal failed to include instructions as to where the request for a hearing was to be filed.[72] Reduction of school employee weekly hours from 44.5 to 40 hours to comply with FLSA constituted a "partial termination" under the state Fair Dismissal Act entitling employees to prior written notice of the reduction and opportunity for a hearing.[73]

Aspects of Hearing

Issues involving employee hearings arose under both state statutes and the Federal Constitution. A technical aide hired for the school year who received notice of termination in October was entitled to a formal hearing under the state Administrative Procedure Act because a substantial interest of a party was at issue.[74] A tenured fifth grade teacher excluded from a courtroom where his students were testifying regarding a charge of "unbecoming conduct," but who was provided with a closed-circuit television hookup, was denied his right under state law to confront his accusers.[75] A tenured teacher's state statutory right to a private hearing, at the teacher's request, on charges for dismissal was not violated when the school board voted in a public hearing to proceed with the charges in a private hearing.[76]

School employees both won and lost regarding constitutional challenges to aspects of hearings. A federal appeals court ruled unconstitutional an Oklahoma statute which required a discharged tenured teacher to pay 50% of the expenses of a statutory due process hearing and the cost of the official transcript because the teacher had a protectable property right and the statute imposed "a significant and unjustified open-ended penalty on the exercise of a consti-

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72. Duruttya v. Board of Educ. of County of Mingo, 382 S.E.2d 40 (W. Va. 1989).
73. Carter v. Baldwin County Bd. of Educ., 532 So. 2d 1017 (Ala. Civ. App. 1988).
74. Taylor v. School Bd. of Seminole County, 538 So. 2d 150 (Fla. Dist. Ct. App. 1989).
75. *In re* Wolf, 555 A.2d 722 (N.J. Super. Ct. App. Div. 1989).
76. Halm v. Board of Educ. of the Dansville Agricultural Schools, 436 N.W.2d 680 (Mich. Ct. App. 1988).

tutional right."[77] An award of $28,000 to a tenured teacher against a school board under a section 1983 claim for failing to provide the teacher with a fair dismissal hearing was upheld. Although the law affords a presumption of honesty and integrity to policymakers who possess decision-making powers, the teacher was able to prove that board members were biased by demonstrating discrepancies between (1) the members' claims at the hearing of no involvement in or familiarity with the case and (2) statements by witnesses at the trial regarding prehearing involvement by board members in attempts to encourage the teacher to resign and comments about the evidence against the teacher.[78]

One case featured a short-term loss for one teacher but a future long-term gain for all teachers. A tenured teacher whose discharge was affirmed by the state Tenure Commission was not denied due process by the fact that the attorney appointed by the school board to act as the hearing officer in disciplinary proceedings against the teacher was a member of the same firm as the attorney representing the school district because there was no evidence of actual bias. However, the court gave notice in the future that failure to appoint an independent attorney to serve as hearing officer will be subject to a *per se* rule of reversal because "the appearance of impropriety and the potential for prejudice are so great as to warrant such a *per se* rule."[79]

DISMISSAL, NONRENEWAL, DEMOTION, AND DISCIPLINE

State statutes, local board policies, and local collective bargaining contracts outline the procedures that must be followed and the charges that may be levied when employees are subjected to many types of adverse employment actions. A wide range of substantive and procedural issues pertaining to teacher discipline and the broad range of effects of teacher removal are reflected in this section.

One such issue arose in Virginia where the conclusion of a fact-finding committee, to which a dismissed teacher was statutorily entitled, that the teacher not be dismissed or placed on probation, was not binding on the school board and the teacher could be dismissed anyway by the board.[80] In Missouri where state statute requires a thirty-day curative period before a tenured teacher can be dismissed

77. Rankin v. Independent School Dist. No. I-3, Noble County, Okla., 876 F.2d 838, 841 (10th Cir. 1989).

78. Crump v. Board of Educ. of Hickory Admin. School Unit, 378 S.E.2d 32, 38 (N.C. Ct. App. 1989).

79. Hagerty v. State Tenure Comm'n, 445 N.W.2d 178, 181 (Mich. Ct. App. 1989).

80. Russell County School Bd. v. Anderson, 384 S.E.2d 598 (Va. 1989).

for incompetence, inefficiency, or insubordination, a local school board was not able to dismiss the teacher at the end of a thirty-day curative period because the board failed to produce evidence that the deficiencies had not been cured.[81] In Florida, demotion of a principal's continuing contract to an annual contract entitled him to constitutional due process but the demotion was upheld where he had received the statutory notice of charges and an administrative hearing.[82]

Courts split as to whether reasons given for employee termination were adequate. In Ohio, an appellate court upheld termination of a teacher on the basis of the teacher's past misconduct (gross inefficiency) even after a court had ordered the award of a new contract under which the teacher never served. Since a continuing contract is issued on statutory grounds alone, there can be no *res judicata* as to a charge of gross inefficiency when such conduct existed prior to the award of the contract.[83] In Massachusetts, an employment-at-will employee could be terminated for continued disagreement with an integral reorganization plan at a school where she worked. The "public policy" exception to discharge of employees-at-will was not so broad as to require just cause to terminate such an employee.[84]

On the other hand, termination for incompetency of a tenured teacher was reversed where charges of lack of organization and failure to provide activities and solicit help for remediation and enrichment of students lacked specificity required by the termination statute. In drawing a comparison between pleading and discovery the court observed that "[i]n teacher termination proceedings . . . where discovery is not provided, the charges must perform the office of discovery in pinpointing the allegations."[85] The South Dakota Supreme Court affirmed reinstatement with full-time benefits and back pay of a tenured teacher who had been terminated for two occasions of inappropriate language in the presence of students. The school board's action in refusing to renew the tenured teacher was arbitrary and capricious where a standard of conduct was applied differently to the terminated teacher than to another teacher and where the superintendent violated the state's confidentiality statute and

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81. Selby v. North Callaway Bd. of Educ., 777 S.W.2d 275 (Mo. Ct. App. 1989).
82. Edgar v. School Bd. of Calhoun County, 549 So. 2d 726 (Fla. Dist. Ct. App. 1989).
83. Sylvania Educ. Ass'n v. Sylvania City Schools, 541 N.E.2d 1060 (Ohio Ct. App. 1988).
84. Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School, 533 N.E.2d 1368 (Mass. 1989).
85. Jefferson Consol. School Dist. v. Carden, 772 S.W.2d 753, 759 (Mo. Ct. App. 1989).

FERPA in his disciplinary action of the teacher.[86] In a case resolved on a procedural question, a tenured teacher discharged for immoral conduct because of explicit, crude, and tasteless sexual references in the student newspaper was entitled to litigate the issue of his discharge because prior disallowance of unemployment benefits by an administrative board was decided on a different question of substantial disregard of the employer's interest.[87]

Two cases involved interpretations of collective bargaining agreements. A temporary teacher who was terminated for an unsatisfactory rating was not entitled to have his termination arbitrated under the collective bargaining contract because the contract specifically stated that claims involving teacher ratings were not subject to arbitration and, in addition, a termination under these facts was not "discipline" under the contract, which was arbitrable.[88] A school safety officer who was terminated for using abusive language toward female students was not entitled to a remedy at law where the collective bargaining contract provided for a four-step grievance procedure and the officer had appealed only through the first two steps.[89]

Two cases raised ancillary issues. A teacher who had resigned his position, effective at the end of his first year of teaching rather than go through the nonrenewal process, was considered to have left "voluntarily" and was thus ineligible for unemployment compensation benefits.[90] A tortious interference of contract action would not lie against the superintendent and school board members where the basis of plaintiff-principal's demotion to teacher was the superintendent's evaluations made to the board and where plaintiff failed to plead that the superintendent was motivated by malice.[91]

Insubordination

School boards were both successful and unsuccessful in terminating employees for insubordination. An elementary teacher who refused to attend P.T.A. and faculty meetings and to give a report card to a student when directed to do so was guilty of insubordination and could be dismissed.[92] Similarly, an assistant naval science instructor's refusal on two occasions to conduct extended NJROTC

86. Jager v. Ramona Bd. of Educ., Ramona School Dist., 444 N.W.2d 21 (S.D. 1989).
87. Gerig v. Board of Educ. of the Cent. School Dist., R-III, 767 S.W.2d 586 (Mo. Ct. App. 1988).
88. Mifflin County School Dist. v. Lutz, 551 A.2d 396 (Pa. Commw. Ct. 1988).
89. Cantres v. Board of Educ. of City of N.Y., 535 N.Y.S.2d 714 (App. Div. 1988).
90. Six v. Job Serv. N.D., 443 N.W.2d 911 (N.D. 1989).
91. Franklin v. Harris, 762 S.W.2d 847 (Mo. Ct. App. 1989).
92. Meckley v. Kanawha County Bd. of Educ., 383 S.E.2d 839 (W. Va. 1989).

field trips as directed by the principal constituted insubordination for which the instructor could be dismissed from his tenured teaching position.[93] However, a school superintendent who refused to provide, after three requests from the school board at a board meeting, recommendations for a new basketball coach was not insubordinate or willfully neglectful of his duties when he responded that he needed more information from the community. Failure to nominate someone as a coach of an important school and community sport that does not start for two or three months in order to obtain more information does not rise to the level of insubordination.[94]

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

School boards were generally successful in disciplining or removing employees under this broad category. A high school principal's demotion was upheld as a result of failing to put in writing his expectations for administrative and security staff despite repeated requests to do so, failing to develop a written hall supervision schedule despite repeated requests to do so, and failing to develop an overall building security plan that identified the roles of administrative staff, security guards, and teachers.[95] A tenured elementary teacher could be fined $2,500 for misconduct when she directed one of her students to leave the classroom to call her mother, as a result of which the teacher left the classroom during school hours to meet with the mother to discuss how a traffic ticket issued to the teacher by the mother's husband could be eliminated.[96] A tenured teacher could be discharged for violating the school district's policy against corporal punishment when he slapped or hit several students over a four-year period.[97] A nontenured teacher's dismissal for permitting third grade students to hit or kick other students as part of a classroom "game" and for grabbing a child's shoulder hard enough to cause pain constituted unprofessional conduct and dismissal, rather than a ten-day suspension permitted under state statute, was reasonable under the facts.[98]

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93. Toole v. Jones, 778 S.W.2d 376 (Mo. Ct. App. 1989).
94. State *ex rel.* Blackwell v. Wyoming County Bd. of Educ., 375 S.E.2d 25 (W. Va. 1988).
95. Franklin v. Board of Directors, School Dist. of Kan. City, 772 S.W.2d 873 (Mo. Ct. App. 1989).
96. Sperling v. Board of Educ. of Poughkeepsie City School Dist., 541 N.Y.S.2d 242 (App. Div. 1989).
97. Tomczik v. State Tenure Comm'n, 438 N.W.2d 642 (Mich. Ct. App. 1989).
98. Roberts v. Santa Cruz Valley Unified School Dist. No. 35, 778 P.2d 1294 (Ariz. Ct. App. 1989).

However, school board discipline and dismissal efforts were not always successful. A tenured teacher who had a seventeen year unblemished teaching record and who had imposed against him a suspension without pay for six months due to four acts unbecoming a teacher (i.e., inappropriate choice of language towards students) received a penalty "disproportionate to the offense as to be shocking to one's sense of fairness."[99] A school principal who had taken a trip authorized by the school board as a single trip, but who subsequently charged the school district for a double room occupied by himself and a female friend, was entitled to be reinstated after being dismissed for misconduct. Because past practice had permitted taking a guest and because the principal had an otherwise exemplary twenty-five-year record, the board acted arbitrarily in dismissing him; however, the principal had to reimburse the school board for the expense of his guest and he was reinstated without back pay.[100]

A New York case discussed the matter of proof comparing the Penal Code to teacher dismissal. A school district was not required to prove by a preponderance of the evidence each element of assault in the third degree as found in the Penal Code to support a dismissal for misconduct after a teacher had kicked a student.[101]

Immorality

Three cases with quite diverse issues arose under this section. Dismissal of a teacher for massaging the backs and chests of female high school students and for attempted sexual intercourse with them was justified under the statutory ground of immorality as a basis for dismissal.[102] A settlement agreement between a tenured teacher and a school board whereby the teacher agreed to resign in return for the district's prohibition from divulging information regarding the teacher's pedophilia was held to be void as against public policy.[103] In South Dakota, a school district which dismissed a tenured teacher with twenty-five years teaching experience for sexual contact with a current student could properly admit testimony of a student who had graduated four years earlier regarding the teach-

99. McFadden v. Board of Educ. Nanuet Union Free School Dist., Rockland County, 544 N.Y.S.2d 885, 886 (App. Div. 1989).
100. Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989).
101. Aronsky v. Board of Educ., 541 N.Y.S.2d 552 (App. Div. 1989).
102. Johnson v. Board of Trustees, Beaverhead County High School Dist., 771 P.2d 137 (Mont. 1989).
103. Bowman v. Parma Bd. of Educ., 542 N.E.2d 663 (Ohio Ct. App. 1988).

er's sexual advances toward her under the "prior bad acts" evidence rule.[104]

Incompetence

One case under this section dealt tangentially with the issue of incompetence. Under state law, a tenured teacher who took a medical leave of absence for longer than thirty days because of work related stress or mental illness was entitled to return to work upon submission of medical evidence of recovery. The burden then shifted to the school to prove incompetence if the board wanted to deny return to work. But requiring the teacher to be approved by the district's physician before she could return to work violated state law and the teacher's due process, entitling her to reinstatement and backpay.[105]

Compliance with School Board Policies and State Statutes

Courts have tended to give great latitude to school boards in complying with a variety of statutory requirements. A special education administrator whose annual contract had not been renewed after three years had not been "removed or discharged" within the meaning of a statute governing right to notice, but since tenure did not attach until issuance of the fourth annual contract, the administrator had no property right to continued employment.[106] A dismissed teacher was not required to be reinstated under state law because some of the reasons relied upon by the superintendent for dismissal were not substantiated, as long as some of the reasons could be substantiated.[107] In Louisiana, basic skills strategists were administrators/consultants under a state statute prohibiting such persons from being paid a lower salary than the previous year, but a reduction in work year and administrative pay supplement of the basic skills strategists did not constitute a "removal from office" so as to invoke the protective safeguards of the tenure act.[108]

Two cases involved claims for unemployment compensation benefits flowing from school board action. Discharge of a teacher who

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104. Strain v. Rapid City School Bd. for Rapid City Area School Dist., 447 N.W.2d 332 (S.D. 1989).

105. Raven v. Oakland Unified School Dist., 254 Cal. Rptr. 37 (Ct. App. 1988).

106. Costello v. School Comm. of Chelsea, 544 N.E.2d 594 (Mass. App. Ct. 1989).

107. Thomas v. Cascade Union High School Dist. No. 5, 780 P.2d 780 (Ore. Ct. App. 1989).

108. Brooks v. Orleans Parish School Bd., 550 So. 2d 1267 (La. Ct. App. 1989).

failed to complete professional education credits required for a teaching certificate constituted a "provoked discharge" under state law making the teacher ineligible for benefits.[109] A high school bookkeeper, dismissed because of chaotic bookkeeping problems that included unpaid overdue bills, improperly entered ledger accounts and unaccounted for funds, was not entitled to unemployment compensation because her discharge had been for misconduct in connection with work.[110]

A tenured school counselor, who was considered for federal income tax purposes to be an independent contractor as a member of a religious order living a life of poverty and chastity under obedience, was nonetheless an employee of the school district; dismissal of the counselor without following procedures under the tenure statute resulted in damages of $63,245.13.[111]

Courts have upheld a wide range of school board decisions and policies made pursuant to state statutes: discharge of a tenured teacher with long-standing emotional and behavioral problems who did not come under the statutory prohibition of dismissal of teachers with temporary disabilities;[112] nonrenewal of a probationary superintendent where the number of required evaluations substantially complied with the statutorily mandated three evaluations per year;[113] refusal to reemploy a teacher who had resigned pursuant to a settlement agreement whereby a school board agreed not to proceed with a termination hearing;[114] refusal to furnish to a nontenured teacher a reason for nonrenewal where state statute required request for such reason occur within ten days of notice of nonrenewal;[115] refusal to furnish a reason for nonrenewal to a nonrenewed teacher who failed to exhaust grievance procedures under the collection bargaining agreement;[116] discharge of a probationary teacher for establishing a staggered attendance system contrary to explicit instructions of the principal and superintendent, leaving school without permission, and abruptly leaving a meeting with the princi-

109. *In re* Hannah, 534 N.Y.S.2d 752 (App. Div. 1988).
110. Craft v. Virginia Employment Comm'n, 383 S.E.2d 271 (Va. Ct. App. 1989).
111. Beine v. Board of Educ. of Cabell County, 383 S.E.2d 851 (W. Va. 1989).
112. Beechwood v. Board of Educ. of School Dist. No. 11, 767 P.2d 1234 (Colo. Ct. App. 1988).
113. Allen v. Board of Educ. of Indep. School Dist. No. 582, Jasper, Minn., 435 N.W.2d 124 (Minn. Ct. App. 1989).
114. Branch v. Greene County Bd. of Educ., 533 So. 2d 248 (Ala. Civ. App. 1988).
115. Keller v. School Dist. No. 5, 774 P.2d 409 (Mont. 1989).
116. Thompson v. Board of Trustees of School Dist. No. 2, Yellowstone County, 774 P.2d 412 (Mont. 1989).

pal and superintendent;[117] denial of accidental disability retirement to an injured employee;[118] transfer of a principal to a teaching position;[119] discharge of a teacher who was unable to take advantage of state statute providing for remediations because of extended illness;[120] nonrenewal of probationary superintendent where the school board had performed the minimal required number of statutory evaluations;[121] and nonrenewal of a school district's Director of Maintenance and Director of Financial Affairs/Business Manager without notice of nonrenewal and opportunity for a hearing because the employees were not "teachers" under the state's Term Contract Nonrenewable Act.[122] An Illinois statute which requires school boards to initiate or develop remediation programs for teachers with unsatisfactory evaluations was interpreted to mean that school administrators could perform such functions instead of the State Board and that a teacher was not improperly dismissed where his plan had been designed and evaluated by his school administrator.[123] In a somewhat unrelated, but nonetheless interesting and novel, case, removal of a school board member was upheld as a result of a criminal conviction during his term in office.[124]

A number of cases have found that school board actions have not complied with state law: termination of an athletic director assignment without following statutory nonrenewal procedures where the following year's contract involved not only elimination of the compensation for the athletic director but also a 1/7 reduction in base teaching salary;[125] laying off janitorial employees without following statutory lay-off procedures;[126] termination of a superintendent pursuant to his oral resignation where state statute required the resignation be submitted in writing;[127] discharge of a school cafeteria employee without giving written charges of grounds for dismissal, even

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117. Ford v. Caldwell Parish School Bd., 541 So. 2d 955 (La. Ct. App. 1989).
118. Maynard v. Board of Trustees of Teachers' Pension and Annuity Fund, 549 A.2d 1213 (N.J. 1988).
119. Odegaard v. Everett School Dist. No. 2, 780 P.2d 260 (Wash. Ct. App. 1989).
120. Blake v. Commission on Professional Competence, 260 Cal. Rptr. 690 (Ct. App. 1989).
121. Tornow v. Board of Educ. of Indep. School Dist. No. 118, Remer, Minn., 435 N.W.2d 142 (Minn. Ct. App. 1989).
122. Hightower v. State Comm'r of Educ., 778 S.W.2d 595 (Tex. Ct. App. 1989).
123. Powell v. Board of Educ. of City of Peoria, Dist. 150, 545 N.E.2d 767 (Ill. App. Ct. 1989).
124. State v. Spooner, 532 So. 2d 530 (La. Ct. App. 1988).
125. Coles v. Glenburn Pub. School Dist. No. 26, 436 N.W.2d 262 (N.D. 1989).
126. State v. Spurlock, 537 N.E.2d 641 (Ohio 1989).
127. Petrella v. Siegel, 537 N.Y.S.2d 124 (1988).

though the employee was excluded from the state's tenure law;[128] failure of the school board to select within the statutory time limit a member of the review panel to consider a discharged employee's appeal, which resulted in reinstatement on the grounds that the board was considered to have abandoned its attempt to terminate the employee;[129] failure of a school board to hold an appeal hearing within a sixty-day statutory limitation;[130] and refusal by a school board to move a tenured elementary teacher up the salary scale based on teaching experience and education without according the teacher the same statutory procedural right applicable to termination.[131]

One case represented a clear victory for neither teacher nor school board. The sole remedy for a probationary teacher who had not received notice of nonrenewal as required by state statute was an action of entitlement to a contract for the following year, but the teacher was not permitted under state law to pursue her current action for money damages.[132]

REDUCTION-IN-FORCE AND INVOLUNTARY LEAVES OF ABSENCE

Reorganization or consolidation of school districts or property within districts, declining student enrollments, or fiscal restraints may necessitate a reduction-in-force (RIF). The sufficiency of reasons for RIF, the actual selection of employees to be laid off, the realignment or reassignment of employees, and call-back rights are governed by state tenure statutes, local board policies, and/or collective bargaining agreements. RIFed employees normally do not have a legitimate claim of entitlement to positions that invokes constitutional due process, but substantive criteria and procedures specified by state law must be followed. Thus, teachers at an area vocational school subject to RIF because of program changes and declining enrollments were considered to be teachers in a higher education institution and, consequently, entitled to due process procedures under the Higher Education Process Act in effect at that time.[133] However, a teacher of remedial reading and math in a federally funded chapter I

128. Winston v. Orleans Parish School Bd., 545 So. 2d 1174 (La. Ct. App. 1989).
129. Washington v. Bessemer Bd. of Educ., 547 So. 2d 888 (Ala. Civ. App. 1989).
130. Hawkins v. McCain, 549 So. 2d 1345 (Ala. Civ. App. 1989).
131. Long v. School Dist. of Univ. City, 777 S.W.2d 944 (Mo. Ct. App. 1989).
132. School Bd. of City of Norfolk v. Giannoutsos, 380 S.E.2d 647 (Va. 1989).
133. Burreson v. Boulder Valley School Dist., 764 P.2d 412 (Colo. Ct. App. 1988).

program, who was employed on a year-to-year basis and paid with federal funds, was not covered by the school board's reduction-in-force policy which required the school board to avoid dismissal of teachers, if possible, by absorbing them within the system.[134]

Necessity for Reduction-in-force

Three cases revealed that courts do scrutinize carefully the necessity for RIF. In one case, a 4% decline in total student enrollment over four years did not justify elimination of one of three school nurse positions, a 33 1/3% reduction in staff.[135] In a second case, a court determined that when a school board decides to suspend a tenured teacher's contract only a few weeks before the start of a new school year, it (the court) can look at enrollment before and after suspension in order to determine whether a decline indeed existed during and immediately following the year of suspension. In this case a long-term enrollment decline that had ceased the year before the tenured teacher's contract was suspended did not justify suspension of the contract because enrollment was now increasing at the high school in which the teacher taught.[136] On the other hand, a school board did not have to look across its entire budget in pursuing reduction-in-force and thus could reduce the teaching staff in the exceptional children program for which funds had been significantly decreased where the major use of such funds had been for staff salaries and the program quality could be maintained with fewer teachers.[137]

Elimination of Position

Cases in this section tend to overlap with the issue of selecting the employees to be retained as discussed under the next section. Two teachers terminated when two of five teaching positions in health sciences were eliminated were ordered to be reinstated on the basis that a provision in the collective bargaining agreement, requiring that teaching time in other areas be included in determining seniority, violated the state's education law section providing that services of a teacher having the least seniority within a tenure position were to be discontinued upon elimination of a position.[138]

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134. Abbott v. Claiborne Parish School Bd., 550 So. 2d 294 (La. Ct. App. 1989).
135. Leu v. Newton Community School Dist., 441 N.W.2d 408 (Iowa Ct. App. 1989).
136. Phillips v. South Range Local School Dist. Bd. of Educ., 543 N.E.2d 492 (Ohio 1989).
137. Taborn v. Hammonds, 380 S.E.2d 513 (N.C. 1989).
138. Szumigala v. Hicksville Union Free School Dist. Bd. of Educ., 539 N.Y.S.2d 83 (App. Div. 1989).

Selection of Employees

All of the cases in this section deal with interpretation of state law and sometimes those interpretations could involve extremely technical aspects. An industrial arts teacher who had taken a temporary approved leave of absence to accept a nonprofessional public relations position did not lose his seniority as a professional employee and thus he was improperly furloughed as the least senior nonprofessional employee when a nonprofessional position was eliminated.[139] A tenured teacher with certification as a psychometrist had her contract improperly cancelled when a new position of psychometrist/counselor was filled by a nontenured teacher who was not certified as a psychometrist.[140] Under Pennsylvania law a school board improperly furloughed a guidance counselor and assigned a classroom teacher to that position because even though the teacher had more years seniority he had no experience as a guidance counselor.[141] A tenured auto mechanics teacher whose shop classes had been eliminated, but who was also certified in social sciences, was improperly nonrenewed when a nontenured teacher was hired to teach social science courses.[142] Under Michigan law, tenured teachers who held counselor positions were not entitled to position-specific tenure and their positions could be filled by tenured teachers who had greater seniority but who had not been assigned previously as counselors.[143] In a case controlled by language in the collective bargaining agreement, a school board acted correctly in terminating a tenured teacher based on departmental rather than district-wide seniority.[144] In a case of a procedural nature, a director of the school's driver education program, who taught driver's education during the nine-month school year and then during the summer on a special contract, was entitled to both sixty days notice under the continuing contract statute and assignment based on seniority when the school district sought to give the summer assignment to an administrator with less seniority.[145]

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139. Waslo v. North Allegheny School Dist., 549 A.2d 1359 (Pa. Commw. Ct. 1988).
140. Stewart v. Fort Wayne Community Schools, 545 N.E.2d 7 (Ind. Ct. App. 1989).
141. Wattsburg Area School Dist. v. Jarrett, 550 A.2d 1379 (Pa. Commw. Ct. 1988).
142. Bauer v. Board of Educ., Unified School Dist. No. 452, 765 P.2d 1129 (Kan. 1988).
143. Belanger v. Warren Consol. School Dist. Bd. of Educ., 443 N.W.2d 372 (Mich. 1989).
144. Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n, 553 A.2d 913 (Pa. 1989).
145. Duncan v. Board of Educ. of United Township High School Dist. No. 30, 532 N.E.2d 927 (Ill. App. Ct. 1988).

Two cases related to assignment of employees and certification. In assigning a teacher to fill a needed area, a school board could assign a nontenured teacher certified in the needed area rather than a tenured teacher who did not acquire certification in the area until the summer following the assignment because the controlling date for certification was April 10, the date by which nonrenewal notices had to be sent.[146] Similarly, a school board in another state was required to consider certification at the time furlough decisions had to be made, and thus did not have to consider an additional certification a teacher claimed he would have by the time school started in the fall.[147]

Realignment/Reassignment

Generally, courts have found that school board realignments or reassignments were improperly accomplished. Minnesota follows the judicial interpretation of state statute that a multiple licensed more senior teacher has to be reassigned if the reassignment will permit a less senior teacher to be retained in his area of licensure.[148] Such protection of seniority must also apply when reinstating teachers from unrequested leaves of absence.[149] However, the judicial interpretation of state statute can be obviated by a collective bargaining agreement and thus a teacher who lost .57 of his teaching assignment credits according to the agreement had no cause of action under state statute since the agreement was considered to have removed the statutory duty to realign.[150] In addition, a school board had no obligation to create a full-time position for a tenured teacher assigned part-time to teaching title I classes where all such classes were taught only in the morning.[151]

In other cases, a teacher was entitled to reinstatement when her suspension resulted from the school board improperly deleting an area of certification for another teacher which had the effect of making the other teacher more senior.[152] A teacher who requested and re-

146. Butler v. Board of Educ., Unified School Dist. No. 440, 769 P.2d 651 (Kan. 1989).
147. Whitling v. Keystone School Dist., 560 A.2d 909 (Pa. Commw. Ct. 1989).
148. Heruth v. Independent School Dist. No. 11, 434 N.W.2d 470 (Minn. Ct. App. 1989).
149. Harms v. Independent School Dist. No. 300, La Crescent, 441 N.W.2d 522 (Minn. Ct. App. 1989).
150. Destache v. Independent School Dist. No. 832, 434 N.W.2d 270 (Minn. Ct. App. 1989).
151. *In re* Independent School Dist. No. 318, 435 N.W.2d 81 (Minn. Ct. App. 1989).
152. McKeesport Area School Dist. v. Cicogna, 558 A.2d 116 (Pa. Commw. Ct. 1989).

ceived from the school board medical leave resulting from stress in teaching special education was entitled under her contract and state statute to be assigned to an open regular elementary classroom position for which she was certified and which did not create stress-related medical problems.[153]

Call Back Rights

Call back rights are generally controlled by collective bargaining agreements and state certification requirements. An excessed elementary teacher on a preferred eligible list was not entitled to recall to a vacant elementary position where she was not certified to teach remedial reading, a required qualification for the position.[154] However, a tenured teacher who had acquired an additional endorsement in learning disabilities while furloughed was entitled to recall to a learning disabilities position ahead of probationary teachers with less seniority.[155] A school employer has the right to fill a position with one employee rather than divide a position to accommodate an employee on the call-back list who wants only a part-time position.[156] Placement of a teacher's name on a call-back list, if the nonrenewal was due to RIF, may be a right under the collective bargaining agreement,[157] but a school board can still have discretion in determining whether a position is "open" for call-back purposes, such as where the school board anticipates that an ill teacher will return for the following year.[158]

CONTRACT DISPUTES

Board Policies and Contract Stipulations

The nature of a school employee's contract and differing interpretations of the provisions in that contract tend to foster litigation. Collective bargaining contracts furnish the matrix for lawsuits. Collective bargaining contract provisions prevailed over school board

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153. Jay School Corp. v. Cheeseman, 540 N.E.2d 1248 (Ind. Ct. App. 1989).

154. Dionisio v. Board of Educ. of Mahopac Cent. School Dist., 538 N.Y.S.2d 47 (App. Div. 1989).

155. Hodgeson v. Board of Educ. of Buena Vista School Dist., 438 N.W.2d 295 (Mich. Ct. App. 1989).

156. Murray v. Sonoma County Office of Educ., 256 Cal. Rptr. 353 (Ct. App. 1989).

157. Tye v. Board of Educ. of Polaris Jt. Vocational School Dist., 541 N.E.2d 466 (Ohio Ct. App. 1988).

158. Flemmer v. Tammany Elementary School Dist. No. 343, 774 P.2d 914 (Idaho Ct. App. 1989).

decisions where the contract required the school district to point out weaknesses and make suggestions for improvement of probationary candidates for tenure prior to termination[159] and where the contract required arbitration of seniority disputes between teachers with regard to transfers.[160] Collective bargaining contracts were held not to be impediments to school board decisions where the board refused to pay additional compensation to teachers who worked during days rescheduled for those missed because of snow[161] and where a contract provision requiring binding arbitration of grievances was not enforceable as to a probationary teacher whose reemployment was considered solely a decision for the board.[162] School board decisions were upheld in the following cases where the collective bargaining contract contained no applicable provision: assignment of a high school teacher to a six-period teaching day even though school policy called for five periods of teaching;[163] and refusal to pay additional compensation to teachers assigned to hallway duty during lunch time even though teachers assigned to lunchroom duty received additional compensation.[164]

Frequently, school district contractual decisions are affected by statutory provisions. A state statute, which set the certificated salary schedule and which in turn did not prevent salary increases by local school boards beyond the state schedule, was interpreted as prohibiting a local school board from reducing its contributions to the superintendent when the state salary was increased.[165] In two other cases, a school district was required to reinstate a teacher whose long-term substitute contract in another district while she was on extended leave of absence was not considered to be a breach of her continuing contract[166] and a school district could not break up statutorily required daily planning periods into segments less than the length of a normal class period.[167] In two similar cases, a school

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159. Board of Educ. of Patchogue-Medford Union Free School Dist. v. Patchogue-Medford Congress of Teachers, 535 N.Y.S.2d 57 (App. Div. 1988).

160. Alexander Local School Dist. Bd. of Educ. v. Alexander Local Educ. Ass'n, 534 N.E.2d 107 (Ohio Ct. App. 1987).

161. Halley v. Board of School Trustees of Blackford County School Corp., 531 N.E.2d 1182 (Ind. Ct. App. 1988).

162. Mindemann v. Independent School Dist. No. 6 of Caddo County, 771 P.2d 996 (Okla. 1989).

163. Rapid City Educ. Ass'n v. Rapid City School Dist. No. 51-4, 433 N.W.2d 566 (S.D. 1988).

164. Rapid City Educ. Ass'n v. Rapid City School Dist. No. 51-4, 446 N.W.2d 770 (S.D. 1989).

165. Bedford County Bd. of Educ. v. Harris, 763 S.W.2d 750 (Tenn. Ct. App. 1988).

166. Dokmo v. Independent School Dist. No 11, Anoka-Hennepin, 443 N.W.2d 231 (Minn. Ct. App. 1989).

167. Gant v. Waggy, 377 S.E.2d 473 (W. Va. 1988).

bus driver, who drove school bus routes under two separate contracts, was entitled to only one $1,000 salary increase under a statute which provided a $1,000 salary increase for each bus driver position,[168] while noninstructional personnel working as both secretaries and lunchroom managers were likewise entitled to only one such pay increase, even if they worked twenty hours or more at each job.[169] Finally, a state statute requiring a supplemental contract of employment for services other than those in the principal contract of employment did not require additional compensation for supervising children at noon recess.[170]

School district action can also be affected by individual contract language. Courts interpreting the language of individual contracts held for school boards where: the school board treasurer by contract was a "nonteaching employee" and as such was not entitled to pay for unused vacation leave;[171] a release negotiated between a teacher and the school board for all claims "whether known or unknown" could not be invalidated in the absence of fraud, coercion, or duress;[172] and where contract language for fifteen years between the school board and superintendent expressly and unequivocally precluding him from obtaining tenure rights was enforceable even though the board had failed to authorize the current contract.[173] Courts interpreting the language of individual contracts held against school boards where: a school board tried to refuse payment of terminal pay for accumulated sick leave because ten of the teacher's sixteen years service were in another school district in the same state;[174] a board's order to a tenured teacher, who was also director of an area vocational school, to teach at a high school amounted to an improper termination or modification of his contract;[175] a school board served notice of termination to thirty-seven employees in violation of a settlement agreement;[176] a school board cancelled a superintendent's three-year contract after the first year and declared vacant the position of superintendent of schools without notice or a hearing;[177] and a school board sought to terminate a probationary ad-

168. Machen v. Scottsboro City Bd. of Educ., 537 So. 2d 27 (Ala. Civ. App. 1988).
169. Sellers v. Lowndes County Bd. of Educ., 550 So. 2d 1021 (Ala. Civ. App. 1989).
170. NEA-Goodland v. Board of Educ., U.S.D. No. 352, Sherman County, 775 P.2d 675 (Kan. Ct. App. 1989).
171. Erkkila v. Painesville Township Bd. of Educ., 535 N.E.2d 385 (Ohio Ct. App. 1987).
172. Harrison v. Arlington Indep. School Dist., 717 F. Supp. 453 (N.D. Tex. 1989).
173. Thorin v. Bloomfield Hills School Dist., 445 N.W.2d 448 (Mich. Ct. App. 1989).
174. Pitts v. Bay County School Bd., 540 So. 2d 157 (Fla. Dist. Ct. App. 1989).
175. *Ex parte* Ezell, 545 So. 2d 52 (Ala. 1989).
176. Thomas v. Board of Educ. of McDowell County, 383 S.E.2d 318 (W. Va. 1989).
177. Lewiston-Porter Cent. School Dist. v. Sobol, 546 N.Y.S.2d 227 (App. Div. 1989).

ministrative employee contrary to contract language providing termination for cause and written notice prior to discharge.[178]

In a final category school boards were held to have exceeded their discretion where: a school board failed to hire a clearly better qualified applicant when the applicant's personnel file contained no documentation to support its reasons for not hiring her;[179] a board refused to permit a teacher to resign his coaching responsibilities when the board had no established policy on assigning extra duties;[180] and a board sought to retract a year's credit it had granted which would have had the effect of reducing a teacher one step on the salary scale.[181]

Administrative Regulations and Statutory Provisions

School board actions have implicated a wide variety of state and federal statutes. An "on-call" substitute teacher was not eligible for unemployment compensation benefits because his employment relationship with the school district had not altered and he was therefore still considered an employee under state statute.[182] Similarly, a football coach who had injured his leg during a game which resulted in amputation was considered to be an independent contractor and thus not eligible for unemployment compensation benefits.[183] Likewise, a teacher was considered to have left her job "for cause of a necessitous and compelling nature," and would thus be eligible for unemployment compensation benefits, after she voluntarily quit to be with her husband who had taken a job 100 miles from home.[184]

In Alabama, a state constitutional provision prohibiting elected public officers from participating in the Employee Retirement System was held not to apply to elected school superintendents because they served under county boards of education.[185] In New York, new

178. Averback v. Board of Educ. of New Paltz Cent. School Dist., 541 N.Y.S.2d 655 (App. Div. 1989).

179. State *ex rel.* Oser v. Haskins, 374 S.E.2d 184 (W. Va. 1988).

180. Lewis v. Board of Educ. of N. Clay Community Unit School Dist. No. 25, 537 N.E.2d 435 (Ill. App. Ct. 1989).

181. State v. Windham Exempted Village School Dist. Bd. of Educ., 537 N.E.2d 646 (Ohio 1989).

182. Texas Employment Comm'n v. Southside Indep. School Dist., 775 S.W.2d 733 (Tex. Ct. App. 1989).

183. Lynch v. Workmen's Compensation Appeal Bd., 554 A.2d 159 (Pa. Commw. Ct. 1989).

184. Mechanicsburg Area School Dist. v. Commonwealth, 551 A.2d 401 (Pa. Commw. Ct. 1988).

185. Edmonds v. Bronner, 547 So. 2d 1172 (Ala. 1989).

state regulations establishing minimum operating standards for hospitals were not arbitrary, capricious, or an abuse of discretion in requiring the hiring of additional staff unavailable from the labor pool because the new staffing requirements could be complied with by restructuring schedules and implementing hospital-specific procedures.[186]

A workers' compensation case was decided for the employee where a bookkeeper for two educational agencies was determined to be eligible for benefits after her nonrenewal by one agency resulted in her losing benefits from the second agency since she had now fallen below thirty hours per week.[187] However, a workers' compensation claimant who had refused to make herself available for modified work while receiving disability payments could be denied workers' compensation where her physician had recommended she return to work and the Workers' Compensation Bureau's request to return to work was a reasonable attempt to test the claimant's limitations under proposed modifications of her job.[188]

Several cases dealt with a broad category of employee benefits. A teacher, who had taught six years before quitting and withdrawing his contributions to the state teacher's retirement system fund, was entitled, upon resuming teaching again the next year, to three years creditable service for purpose of calculating retirement benefits.[189] A teacher assigned to teach music during her first year was not eligible for assignment to level two in the career ladder statute because one of her second year assignments was a special study hall for disciplinary problems which involved no teaching or student evaluation.[190] Under California's Educational Employment Relations Act a school district was prohibited from withholding from a nonunion member's paycheck the portion of a service fee used for union activities beyond the union's representational obligations.[191] In New York, a state regulation which permitted those compensated under a nonadministrative teacher salary schedule, but not under an administrative or supervisory salary schedule, to be eligible for excellence in teaching set-aside grants was held to be violative of the equal protection clause.[192] In two sick leave cases involving maternity, one

186. Hospital Ass'n of N.Y. State v. Axelrod, 546 N.Y.S.2d 531 (Sup. Ct. 1989).
187. Isabelle v. Department of Employment and Training, 554 A.2d 660 (Vt. 1988).
188. Risch v. North Dakota Workers Compensation Bureau, 447 N.W.2d 308 (N.D. 1989).
189. Schmidt v. Wisconsin Employee Trust Funds Bd., 436 N.W.2d 918 (Wis. Ct. App. 1989).
190. Moore v. Central Educ. Agency, 768 S.W.2d 1 (Tex. Ct. App. 1989).
191. Cumero v. Public Employment Relations Bd., 262 Cal. Rptr. 46 (Cal. 1989).
192. Schneider v. Sobol, 546 N.Y.S.2d 221 (App. Div. 1989).

teacher was able to use sick leave beyond the customary six-week period because the sick leave was related to a statutory reason, "pregnancy,"[193] while in another case a teacher was not entitled to five weeks maternity leave with pay where state statute allowed, but did not require, city school boards to grant additional sick leave.[194]

In two peripheral cases, a school administrator was unsuccessful in declaring invalid a state Peer Assistance and Review Program which she considered in conflict with her statutory duties to evaluate classroom teachers,[195] and an elementary teacher who had successfully defended himself against charges of sexual assault against students was unsuccessful in seeking indemnification for legal expenses from the school board.[196]

TENURE

"Tenure" is a statutory right to continuing contract status which also entitles tenured employees to procedural due process protection and to termination "for cause." Certificated personnel such as teachers and principals can acquire tenure in most states and noncertificated personnel can acquire tenure in some states.

Some states permit teacher or administrative tenure to attach if a person moves vertically from one category to another, but in other states a probationary period must be served after any change in certificated category. It is more likely that certificated administrators will already be certificated teachers for purposes of vertical movement than vice-versa. Tenure transfer from one district in a state is controlled by state law.

Tenure Status

Tenure is normally acquired by being offered a contract for the year beyond the statutory number of probationary years. Any interference with this orderly process will affect tenure rights. Thus a teacher who had resigned during his third and last year of probationary teaching after the superintendent informed him he would not be recommended for continued employment did not acquire tenure even though the school district hired him for the next year as a

193. Hannan v. Chesapeake Union Exempted Village School Dist. Bd. of Educ., 535 N.E.2d 392 (Ohio Ct. App. 1988).
194. Jungina v. Stafford, 535 So. 2d 794 (La. Ct. App. 1988).
195. Carnahan v. McWalters, 536 N.Y.S.2d 345 (App. Div. 1988).
196. Monti v. Warwick School Comm., 554 A.2d 638 (R.I. 1989).

substitute for a teacher on sabbatical.[197] A teacher reassigned during his third year of employment as a teacher aide did not qualify for tenure because he did not have three years as a teacher.[198] School boards in California have no power under the state's two-year probationary period to grant tenure after one year, even though a school board had promised a teacher by contract tenure after one year.[199] A teacher who had one year of teaching before accepting a coordinator position for three years was not entitled to teacher tenure because a coordinator did not fit one of the categories to which the tenure statute applied.[200]

Tenure usually depends upon the offer of a contract and thus tenure is not acquired simply because a staff member recommended a third year probationary teacher for tenure.[201] However, collective bargaining contracts may play a part in the tenure process. In Ohio, a teacher had a clear legal right to tenure under a union contract which provided that teachers were eligible for a continuing contract if they had been so recommended by their principal.[202] In another Ohio case a teacher could not be deprived of tenure simply because the teacher had failed to make application as required under the collective bargaining agreement.[203]

Tenure status can arise in a myriad of fact situations. A tenured director of elementary education who was continued as an assistant superintendent and school principal after his director position was eliminated lost his tenure because neither of the two latter positions had tenure status.[204] Full-time tenured school teachers who were part-time school bus drivers were employees-at-will as to their bus driving and could be terminated without complying with the bus operator tenure law.[205] A tenured teacher who took a one year leave of absence which the school board by resolution stated was not mutually agreeable to it lost her tenure status and therefore did not have to be reemployed.[206] A state statute providing for transfer of rights,

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197. Williams v. Lafayette Parish School Bd., 533 So. 2d 1359 (La. Ct. App. 1988).
198. Malone v. Shelby County Bd. of Educ., 773 S.W.2d 256 (Tenn. Ct. App. 1989).
199. Fleice v. Chualar Union Elementary School Dist., 254 Cal. Rptr. 54 (Ct. App. 1988).
200. Berry v. Pike County Bd. of Educ., 545 So. 2d 43 (Ala. Civ. App. 1987).
201. Jeter v. Board of Educ. of School Dist. of Fremont, County of Dodge, 435 N.W.2d 170 (Neb. 1989).
202. State v. Board of Educ. for Cleveland Heights-Univ. Heights City School Dist., 532 N.E.2d 1289 (Ohio 1988).
203. State v. Milton-Union Exempted Village Bd. of Educ., 531 N.E.2d 1297 (Ohio 1988).
204. Shaffer v. School Bd. of Martin County, 543 So. 2d 335 (Fla. Dist. Ct. App. 1989).
205. Thorne v. Monroe City School Bd., 542 So. 2d 490 (La. 1989).
206. Fisher v. Board of Educ. of W. Wash. County Community Unit Dist. No. 10, 537 N.E.2d 354 (Ill. App. Ct. 1989).

benefits, and tenure in transfer of special education personnel from one district to another placed these subjects beyond the district's duty to engage in collective bargaining.[207]

Tenure by Default or Acquiescence

A teacher may seek to secure tenure by taking advantage of a school district's error in oversight. However, a probationary teacher who had not received notice of nonrenewal by March 15 was unsuccessful in gaining tenure even though state statute provided that a teacher in his second probationary year who had not received a nonrenewal notice by that date became a permanent employee. The reason was that the teacher had received on June 10 notice of dismissal for cause, while a final dismissal decision was reached on June 29; in California a probationary teacher cannot acquire tenure when dismissal for cause proceedings are pending.[208]

CERTIFICATION

Certification can refer to rules or regulations, the actual certificate as indicia of one's professional status, and/or the process by which one secures such a certificate. Certain legal implications may flow from possession of a professional certificate. In an interesting divorce case, a wife's teaching certificate conferred prior to the parties' marriage, was not marital property, but the wife's master's degree, reflecting successful completion of a course of study undertaken during marriage, was marital property subject to equitable distribution.[209]

Certification Standards

Professional certificates are usually granted as the result of examination and/or completion of academic requirements. Failure of the examination or failure to maintain one's professional qualifications may adversely affect certification status. Two cases involved teacher certification and unemployment compensation. Two teachers discharged for failure to pass the Teacher Certification Test under the state's Quality Basic Education Act were nonetheless eligi-

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207. Dearborn Fed'n of Teachers Local 681 v. Dearborn Bd. of Educ., 431 N.W.2d 253 (Mich. Ct. App. 1988).

208. Zhigulina v. Los Angeles City Bd. of Educ., 254 Cal. Rptr. 728 (Ct. App. 1989).

209. McGowan v. McGowan, 535 N.Y.S.2d 990 (App. Div. 1988).

ble for unemployment compensation benefits because their failure did not constitute deliberate conscious fault.[210] A teacher who held a teaching certificate from another state and who took, and failed three times, the Florida Teacher's Examination during each year of the three-year Florida temporary certificate was entitled, upon termination at the end of three years, to unemployment compensation because he had made a good faith effort to obtain a Florida teaching certificate and to deny "benefits to one who has made a good faith effort to comply with employment requirements would contravene public policy."[211] In a simple employment case, a temporary bilingual teacher who had taught for one year under a statutory waiver from the bilingual certification requirement did not have to be reemployed as a probationary teacher when she had failed to meet the waiver requirements and teachers with bilingual credentials were available.[212]

School employees who permit their professional certificates to expire may find certain rights adversely affected. A tenured teacher whose teacher's certificate had expired and who received a termination notice shortly thereafter was not entitled to a hearing under the Teacher Tenure Act because the Act defines a "teacher" as one who is "regularly certified"; when the teacher's certification expired she ceased to be a "teacher" within the Tenure Act.[213] A school nurse whose five-year health services credential had expired could be immediately suspended without pay and was not entitled to backpay between the date of suspension and the date of obtaining a new credential. The nurse was not subject to statutory provisions pertaining to grounds and procedural rights for suspension of permanent employees because those provisions applied only to certificated employees and the nurse lost statutory protection when her credential expired.[214]

Decertification, Revocation, or Suspension

Certification agencies have broad, although not unlimited, discretion in penalizing persons holding certificates. A teacher holding a permanent teaching certificate could have his certificate revoked after pleading guilty to one count of mail fraud because, under state

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210. Tanner v. Golden, 377 S.E.2d 875 (Ga. Ct. App. 1989).
211. Gulf County School Bd. v. Washington, 544 So. 2d 288 (Fla. Dist. Ct. App. 1989).
212. Royster v. Cushman, 261 Cal. Rptr. 458 (Ct. App. 1989).
213. Frey v. Adams County School Dist. No. 14, 771 P.2d 27 (Colo. Ct. App. 1989).
214. Stewart v. Acalanes Union High School Dist., 257 Cal. Rptr. 692 (Ct. App. 1989).

law, mail fraud was a crime involving moral turpitude.[215] A school bus driver whose driver's license had been suspended for one year after being found guilty of operating a motor vehicle while intoxicated could have her school bus driver's certificate revoked by the superintendent for business affairs, even though the driver was not notified of revocation or given a hearing, because no one under state law could drive a bus without possessing a driver's license.[216] State laws which required cancellation of, or refusal of renewal of, school bus licenses for three school bus drivers convicted of felonies had a rational purpose and did not violate equal protection of the law.[217] A teacher convicted of sexual battery was not prejudiced by the state education board's withdrawal of its resolution to revoke his teaching certificate after conviction but prior to sentencing and then reintroduction of the resolution after sentencing.[218]

However, education authorities do not have unbridled discretion in altering professional certificates. A school bus driver whose bus license had been revoked because she was diabetic was entitled to have her license reinstated because her diabetic condition had been under control for over three years and her blood sugar level could be checked by a simple finger prick blood test without undue hardship to her employer.[219] Teachers granted provisional teaching certificates in October 1984 for five years had a legitimate expectation of employment for the five-year life of the certificate issued to them and the board of regent's subsequent regulations reducing provisional certificates to three years could not be applied retroactively to the teachers.[220]

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215. Startzel v. Commonwealth Dept. of Educ., 562 A.2d 1005 (Pa. Commw. Ct. 1989).
216. Patton v. Springfield Bd. of Educ., 531 N.E.2d 310 (Ohio 1988).
217. Hill v. Gill, 703 F. Supp. 1034 (D.R.I. 1989).
218. Yoder v. Ohio State Bd. of Educ., 531 N.E.2d 769 (Ohio Ct. App. 1988).
219. Pennsylvania Dep't of Transp. v. Tinsley, 564 A.2d 286 (Pa. Commw. Ct. 1989).
220. Reback v. Rhode Island Bd. of Regents for Elementary and Secondary Educ., 560 A.2d 357 (R.I. 1989).